UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

TK, LLC[1]

and **Case 10-CA-267762**

PLUMBERS AND PIPEFITTERS LOCAL 72, UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO

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John F. Wymer, III, Esq.
for the Respondent,
Lance Geren
for the Charging Party.

DECISION

INTRODUCTION[2]

ANDREW S. GOLLIN, ADMINISTRATIVE LAW JUDGE. The issue in this case is whether TK, LLC ("Respondent") agreed, either by signature or conduct, to be bound to an area collective-bargaining agreement between the Pipefitters Local 72, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO ("Union" or "Charging Party") and the Mechanical Contractors Association of Georgia, Inc. ("Association"). On June 11, 2020,[3] Respondent executed a one-page project labor agreement with the Union for the duration of its work for a construction project in Commerce, Georgia. The General Counsel alleges that by signing that agreement Respondent also agreed to be bound to the area collective-bargaining agreement, which required, inter alia, that it recognize and bargain with the Union as the exclusive bargaining representative of the unit employees, pay contractual wages and fringe benefits, and utilize the Union's exclusive referral service when hiring employees to perform covered work. The latter is referred to as the "exclusivity" provision.

Between June and September, Respondent requested referrals from the Union, paid those employees contractual wages and benefits, and, upon request, deducted and remitted Union dues and assessments. In September, Respondent contemplated subcontracting its work on the project to a third party in order to meet the project deadline. At a September 17 meeting, the Union's attorney reminded Respondent about the exclusivity provision and threatened litigation if the company used non-Union employees to perform covered work. Respondent argued it never agreed to that provision and remained free to hire and fire at-will. Thereafter, on September 23, Respondent notified the Union that it was

[1] The parties stipulated at hearing that Respondent's correct legal name is TK, LLC, not TK Global, LLC. (Tr. 7).
[2] Abbreviations are as follows: "Tr." for transcript; "Jt. Exh." for Joint Exhibits; "GC Exh." for General Counsel's Exhibits; "R. Exh." for Respondent's Exhibits. Although I have included citations to the record to highlight specific testimony or exhibits, my findings and conclusions are based on my review and consideration of the entire record.
[3] All dates refer to 2020, unless otherwise stated.

terminating their agreement effective immediately. On September 25, Respondent discharged the five Union members on the project and rescinded its offer and refused to hire the 13 others it had requested.

The General Counsel alleges that Respondent violated Section 8(a)(5) and (1) of the National Labor Relations Act ("Act") when it notified the Union that it was terminating their Section 8(f) agreement prior to its expiration, repudiated/refused to honor the terms of that agreement, withdrew recognition from, and failed to bargain in good faith with, the Union as the unit employees' exclusive collective-bargaining representative, and discharged the five Union employees and rescinded its offer and refused to hire the 13 others. The General Counsel also alleges that Respondent violated Section 8(a)(3) and (1) of the Act when it discharged/refused to employ these 18 individuals. Respondent denies these allegations and raises various affirmative defenses. For the reasons stated below, I conclude that Respondent committed the violations as alleged.

STATEMENT OF THE CASE

The Union filed its charge in this case on October 16. On September 14, 2021, the Regional Director for Region 10, on behalf of the General Counsel, issued the complaint and notice of hearing. Respondent filed its answer on September 28, 2021, and its amended answer on February 11, 2022. This hearing was held in person on March 21-22, 2022, at the Russell Federal Building in Atlanta, Georgia.

At the hearing, all parties were afforded the right to call and examine witnesses, present any relevant documentary evidence, and argue their respective legal positions. The General Counsel, the Union, and Respondent filed post-hearing briefs, which I have considered.

FACTUAL FINDINGS[4]

A. Jurisdiction

Respondent is an Alabama limited liability company with an office and place of business in Jefferson, Georgia. During the past 12 months, a representative period, Respondent has performed services valued in excess of $50,000 outside the State of Georgia. (Tr. 6-7). Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Respondent also admits, and I find, that the Union has been a labor organization within the meaning of Section 2(5) of the Act.

B. Area Collective-Bargaining Agreement

At all material times, the Union and the Association have been parties to a 2018-2021 area agreement referred to on its cover page as the "Collective Bargaining Agreement" ("CBA"). (Jt. Exh. 1).

[4] The Findings of Fact are a compilation of credible testimony and other evidence, as well as logical inferences drawn therefrom. To the extent testimony contradicts with the findings herein, it has been discredited, either as in conflict with credited evidence or because it was incredible and unworthy of belief. In assessing credibility, I primarily relied upon witness demeanor. I also considered the context of the witness's testimony, the quality of their recollection, testimonial consistency, the presence or absence of corroboration, the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences that may be drawn from the record as a whole. See *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. sub nom., 56 Fed. Appx. 516 (D.C. Cir. 2003). Credibility findings need not be all-or-nothing propositions. Indeed, nothing is more common in judicial decisions than to believe some, but not all, of a witness's testimony. *Daikichi Sushi*, supra at 622; *Jerry Ryce Builders*,352 NLRB 1262, 1262 fn. 2 (2008) (citing *NLRB v. Universal Camera Corp*., 179 F.2d 749, 754 (2d Cir. 1950), rev'd. on other grounds 340 U.S. 474 (1951)). Where necessary, specific credibility determinations are set forth below.

By its terms, the CBA applied to all contractor-members of the Association and all employers that separately entered into a written document---such as a participating agreement to contribute to the benefit funds referenced in the agreement, a letter of assent to be bound to the terms of the agreement, or any other document---by which they agree, among other things, that the Association is their representative for bargaining with the Union. (Jt. Exh. 1, pgs. 4 and 7 of 62).

Article One of the CBA states the Association recognizes the Union as the exclusive bargaining representative for all journeymen, intern journeymen, apprentices, tradesmen and helpers in the employ of a covered employer with respect to wages, hours and other terms and conditions of employment, and to any and all plumbing and pipe fitting work covered by the agreement. It further states that those employers to whom the Union has not yet demonstrated its majority status agree to recognize the Union as the bargaining representative for those employees who were referred or should have been referred by the Union. (Jt. Exh. 1, pg. 5 of 62).

Article Four of the CBA contains the referral/hiring process (referred to as the "exclusivity" provision). It states the Union will furnish the covered employer with duly qualified journeymen, apprentices and helpers in sufficient number as may be necessary to properly execute work contracted for by the employer in the manner and under the conditions specified in the CBA. That employer has the right to determine the number, competency, and qualifications of the employees referred by the Union, and it has "the right to hire and discharge accordingly, provided however, that such rights shall be exercised on a non-discriminatory basis and shall not be based on, or be in any way affected by … union membership, bylaws, rules, regulations, constitutional provisions or any other aspect or obligation of union membership, policies or requirements." (Jt. Exh. 1, pgs 8-9 of 62).

The CBA also addresses other terms and conditions of employment based on geography, including hours of work, overtime, and shift work, wages, benefit trust funds, and working rules and conditions. There is no "just cause" requirement for the termination of employees.

The CBA refers to an addendum with updated wage and benefit amounts. Effective February 2019, the Union and the Association negotiated new contractual wage rates and benefit amounts. Those rates and amounts are contained in a three-page document (referred to as the "Addendum.") (Jt. Exh. 3).[5]

C. Alleged Unfair Labor Practices

1. *Background*

Respondent is engaged in pipefitting fabrication and installation in the building and construction industry. It is owned by Tae Kyong Kim. In November 2019, Respondent was hired by SKI Battery, a South Korean electric battery manufacturer, to perform the pipefitting work on phase one of the company's new manufacturing facility in Commerce, Georgia (referred to as the "construction project"). The multi-phase project is expected to take up to five years to complete. Respondent has a pipe fabrication shop in nearby Jefferson, Georgia where it fabricates the materials for the construction project (referred to as the "fabrication shop").

In December 2019, Kim hired Phillip Ahn to be Respondent's general manager and to assist with hiring employees for the construction project. Ahn is a real estate agent by trade. Kim and Ahn are both

[5] The document is entitled "Revised-Effective February 1, 2019 LU 72 Wage & Fringes Addendum for the 2017-2021 LU 72 CBA." There is no 2017-2021 agreement. Under the circumstances, and after comparing the CBA and the Addendum, I conclude the Addendum updates the terms of the 2018-2021 CBA.

Korean. Ahn speaks English; Kim does not. One of Ahn's duties is to translate for Kim and to communicate on his behalf (in English) in business matters.[6]

In March 2020, Union representative/organizer Chris Inghram visited Respondent's fabrication shop. He spoke with Ahn and asked if the company needed additional employees for the project. Ahn stated they did not need anyone at that time, but he took Inghram's contact information in case a need developed in the future. Ahn did not know Inghram was with the Union, and he had no prior experience dealing with unions.

About three months later, in early June, Kim wanted to hire additional employees for the construction project. The company already had about 30 hourly employees working on the project that it had hired directly, most of whom were Korean. Kim told Ahn he wanted to hire locally to help develop goodwill with the community. In June, Ahn contacted Inghram. Inghram gave Ahn's contact information to David Cagle. Cagle is an organizer for the Georgia Carolina Pipe Trades Association. Cagle assists local unions in their organizing efforts, which includes cold calling non-union contractors, like Respondent, about supplying them with needed employees in order to get them to become signatory to the CBA.

Cagle contacted Ahn and the two met at Respondent's fabrication shop on June 8. At that meeting, Cagle introduced himself as a "marketing representative." (Tr. 112). The two spoke for about 30-45 minutes. Ahn explained the company was interested in hiring about 10 additional employees for the construction project, and he needed Cagle's help in supplying those employees. Cagle said he could supply the additional employees, but the company would first need to sign a project agreement with the Union. (Tr. 64).[7] Cagle did not have a copy of the CBA with him, so he described, in general, what the terms and conditions would be, including the hiring/referral process. (Tr. 63-64). He explained the company had the right to reject or terminate any of the employees referred to work at the project if their skills or performance were not satisfactory, but the employers were asked to let the Union know of any issues so it could try to correct them. (Tr. 68).

2. *Execution of the Project Labor Agreement*

On June 9, Cagle emailed Ahn. (Jt. Exh. 4). The subject line of the email read "CBA for PLA." Attached to the email were two documents, "Local Union 72 (CBA) Updates" and "Untitled attachment 00366.txt." The record does not reflect for certain what the "Untitled attachment" was, but there is no dispute the email included a complete copy of the 62-page CBA.

That same day, Ahn sent Cagle a text message acknowledging receipt of the attachment. (Jt. Exh. 5). He then asked Cagle to confirm that "if [the company] decide[d] to hire" the individuals the Union sent, those individuals would also need to fill out an employment application. He also asked, "Will there be problem our employment is at-will employment. Even we discussed we have right to terminate if we feel not qualified or any other reasons, we may have let go…Will there be a problem[?]" Cagle responded, "Ok. No we are an at will labor organization." (Jt. Exh. 5).[8]

[6] Respondent admits Ahn and Kim are supervisors within the meaning of Sec. 2(11) of the Act. (GC Exh. 1(1)).

[7] Ahn testified Cagle said the company would need to sign a "document", and Cagle testified he told Ahn the company would need to sign an "agreement." Although both struggled to recall the details of this meeting, I found Cagle had a clearer and more detailed recollection of what was said. I, therefore, have credited him regarding this meeting.

[8] Ahn testified he sent this email to get confirmation that employment would be at-will, meaning the company could hire who it wanted and terminate them for any reason. (Tr. 116). Cagle testified his response related only to terminating employees, and the understanding all along was that the company would be required to hire exclusively through the Union's referral service. (Tr. 67). Cagle testified he and Ahn discussed this topic several times, and Ahn's concern each time was over the company's ability to terminate at-will. (Tr. 95). Ahn, who was present for Cagle's testimony, did not refute this. I credit Cagle on this point as his testimony was more logical and consistent.

On June 10, Cagle emailed Ahn with the subject line "Project Labor Agreement for UA Local Union 72 & SKI Battery Plant.docx." (Jt. Exh. 6). Attached was the one-page "Project Labor Agreement." ("PLA"). (Jt. Exh. 2) (Tr. 64-65). The PLA reads:

> Project Labor Agreement for UA Local Union 72 & TK LLC at the SKI Battery Plant, Commerce Georgia and TK LLC Pipe Fabrication Shop located at 274 Galilee Church Road, Jefferson, Georgia 30549
>
> The agreement is a Collective Bargaining Agreement/Project Labor Agreement for the above listed jobsites/projects. The duration of this agreement will be in effect until the end of the above listed jobsites/projects.

(Jt. Exh. 2).

On June 10, Ahn emailed Kim a copy of the CBA and the PLA and asked him to sign the one-page PLA and return it. (Jt. Exh. 7).[9] Regarding the CBA, Ahn informed Kim he had read over the "62 pages of documents as well" but he did "not have the profession on this field." Ahn wrote he believed the CBA "is what they [are] required to give us such as [a] CC&R." ["CC&R" is the abbreviation for the covenants, conditions, and restrictions report that a seller is required to provide to a buyer in a real estate transaction governing the use of the conveyed property (e.g., homeowners' association bylaws).] Ahn also wrote that "most importantly" the Union had "accepted and agreed we are at-will employment and to provide our job application." Kim later signed and returned a copy of the PLA. (Jt. Exh. 2)(Tr. 114).

On June 11, Ahn met with Cagle for the parties to execute the PLA. Cagle brought a copy of the CBA with him and attempted to go through it with Ahn. Ahn, however, stated he wanted to get the PLA signed and to be done. (Tr. 67).

The day after the parties executed the PLA, Ahn emailed Cagle that Respondent was no longer in need of any employees for the construction project because of scheduling issues that had arisen. (R. Exh. 1). Ahn apologized and stated he would contact Cagle if the company planned to hire in the future. He stated that they should void out the agreement for the time being and re-write a new one when the company was ready to hire. Cagle received Ahn's email but did not respond. (Tr. 69-70).

3. *Initial Referrals and Payment of Wages and Fringe Benefit Contributions*

A couple of weeks later, Ahn contacted Cagle and asked him to supply five employees for the construction project. There was no discussion about executing a new agreement. The Union later referred five Union members to fill the request.[10] All five began working for the company on June 29, and they

[9] The email Ahn sent also refers to an attached "Rate Sheet." (Jt. Exh. 7). As stated, the Addendum included the updated wage and fringe benefit rates, but Ahn testified he did not receive a copy of it until after the parties all signed the PLA. (Tr. 159-162). Cagle's June 9 email contained the CBA and another "Untitled attachment." (Jt. Exh. 4). Cagle's June 10 email contained the PLA and an "Untitled attachment." (Jt. Exh. 6). It is both logical and probable that Cagle included the Addendum in one of these two emails to Ahn, and Ahn attached it to his email to Kim.

[10] The Union sends the contractor a referral form with information about the individual and the job. Several of these forms were introduced into the record. At the bottom, there is language authorizing a dues checkoff of two percent on gross wages and an assessment of two percent on gross wages less overtime. There is a signature line below that the employee is to sign. Prior to the COVID-19 pandemic, the Union required the employee to come to the Union hall to sign above signature line on the referral form. During the pandemic, however, in the Union's hall was closed and face-to-face contact was limited, and employees began "signing" these referral forms electronically. Cagle testified that all referred employees are Union members and have on file with the Union a signed a dues check-off

worked for approximately six weeks. (Jt. Exh. 14). During that time, the company paid them wages in accordance with the terms of the CBA and the Addendum. (Tr. 70). Initially, the payroll department was confused with how and where to make the fringe benefit contributions. In early July, Ahn asked the fund administrators for assistance, and the funds provided information, including benefit schedules, blank contribution reports, and other documents, to assist Respondent's payroll department in making the necessary fund contributions. (Jt. Exhs. 8-11). Respondent thereafter made fringe benefit contributions in accordance with the CBA and the Addendum.[11]

Respondent later terminated the employees the Union referred effective August 14. Although the Separation Forms each cited lack of work as the reason for their separation, Ahn testified they were terminated because of their inability to communicate effectively with the company's Korean employees and because the project supervisor was not satisfied with their work. (Tr. 120). Ahn emailed Cagle to notify him of the company's decision to terminate the men, stating that as the two had discussed in early June, the company had the right to terminate the individuals at-will. Ahn concluded his email by stating he hoped the two could work together again in the future. (Jt. Exhs. 11-12). Cagle did not respond, and the Union did nothing to challenge the terminations. Cagle testified the Union took no action because it did not want to jeopardize the "bigger picture" of having future work for Union members on the project. (Tr. 71).

4. *Overtime*

One of the Union members terminated was Randall Stapleton, Jr. Prior to his termination, Stapleton, Jr. was paid his regular rate of pay for working on a Saturday. Cagle later spoke with Ahn and stated Stapleton, Jr. should have been paid overtime for those hours. On August 14, Ahn emailed Cagle seeking clarification because he believed the hours worked were "make-up time" which, according to the CBA, are paid at the employee's regular base pay rate, not their overtime rate. In his email, Ahn quoted from Article 6, Section 2(a) of the CBA, which states:

> Overtime on new construction will be paid at one and one-half (1 ½) times the straight-time rate on all work except for that work performed on Sundays and holidays [which] will be paid at double the straight-time rate. A Saturday make-up day at the regular rate of pay maybe worked to make-up time lost during the normal work week when time is lost for reasons beyond the contractor's control. There will be no make-up days for Holidays.

(Jt. Exh. 13 quoting form Jt. Exh. 1, pg. 15 of 62).

Ahn told Cagle in the email that the company was planning on hiring additional helpers from the Union and he wanted to make sure he and payroll understood how this language should be interpreted so there were no further misunderstandings. (Jt. Exh. 13).

The following day, Cagle responded to Ahn, stating that a "make-up day" under the CBA is for hours lost due to circumstances beyond the contractor's control (e.g., power outages, inclement weather, COVID-19 issues, etc.) However, if an employee, like Stapleton, Jr., starts working a day in their normal

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authorization form that authorizes dues deductions for every covered contractor. He, however, was uncertain whether those forms were forwarded to Respondent with the referrals. (Tr. 80-81; 94-95; 100-107).

[11] The terms of the CBA were not applied to the existing 30 hourly employees working at the construction project. Cagle testified the Union agreed to this arrangement because Ahn informed Cagle that he wanted to replace those existing employees with local (Union) employees, and there was discussion between the two about doing that over time. (Tr. 67-69). I credit Cagle's unrefuted testimony. I also note that neither the General Counsel nor the Union are seeking to have the terms of the CBA applied to any of these 30 employees as part of a remedial order.

work week, they still are paid overtime for any hours worked past the regular workday, which in this case was a Saturday. (Jt. Exh. 15).

5. *Additional Requests for Employees and Referrals*

A week after terminating the five Union members, Ahn contacted Cagle and requested two helpers to work on the construction project. Two Union members were referred out. (Jt. Exh. 16). Both received training (August 20) and then worked one day (August 21) before being terminated. (Tr. 120). Ahn later notified Cagle of their terminations. The Union again took no action.[12]

About two or three weeks later, in early September, Ahn contacted Cagle and requested five individuals to work on the project. The Union referred Randall Stapleton, Sr., Randall Stapleton, Jr., Mathew Jackson, Jesse Alley, and Dustin Printz. These five Union members began working on about September 7, and they worked for a little over two weeks. (Jt. Exh. 20). Respondent paid them wages and fringe benefits in accordance with the CBA and the Addendum.

6. *Subcontracting Work to Genesys*

In September, Respondent began falling behind with its work on the construction project and risked not completing it by the project deadline. Ahn informed Cagle that Kim was interested in subcontracting out the remainder of its work. (Tr. 122-123). Ahn asked Cagle if the Union would be interested in taking on the role of subcontractor. Cagle told him the Union could provide the company with as many workers it needed to complete the project, but it could not take over and manage the completion of the project. (Tr. 122). Ahn later reported Cagle's response to Kim. Thereafter, Kim began communicating with Genesys System Integration, another contractor, about taking over and finishing the project. (R. Exhs. 2-3).

7. *September 17 Meeting and Request for Referrals*

On September 17, at the Union's request, the parties met. Ahn, Kim, Cagle, Inghram, and the Union's attorney Lance Geren, as well as others, attended. Kim and Ahn said they were happy with the five Union members working on the project and wanted to hire 13 more. Ahn asked if Cagle could provide those employees, and Cagle said he would. Later in the meeting, Geren informed Ahn and Kim that under the terms of the agreement, Respondent was required to hire all employees performing covered work through the Union's referral service. Geren referred to another covered contractor that was not complying with that requirement, and the Union sued. Ahn denied that the company agreed to that condition, and he made it clear before he signed the PLA that all employees would be hired and fired at-will. Ahn stated the company never would have signed if they knew it was an exclusive arrangement. (Tr. 128). There was a separate discussion at this meeting about Respondent performing a project in the Las Vegas area. There was a discussion about Respondent needing to hire employees for that project. Inghram texted a contact he had at the local union in the Las Vegas area and to get the local wage rates, which he shared with Kim and Ahn. (Tr. 33).

[12] On August 22, Ahn emailed Cagle about the referral of the two helpers, correcting their start date from August 18 to August 20. (Jt. Exh. 16). Ahn noted the language on the referral forms regarding the deductions for Union dues and assessments, and he informed Cagle that Respondent had made the necessary deductions for those two helpers. At the time, Ahn did not know the individual employees were to sign a document authorizing the deductions, so he signed and returned the referral forms to the Union. (R. Exh. 6). Ahn testified none of the referral forms he received from the Union were signed by employees, and he received no other documents from the Union or the employees authorizing the deduction and remittance of Union dues or assessments. (Tr. 157-158).

The following day, Ahn sent an email to those who attended the meeting. He wrote that Respondent felt threatened by the presence of the Union's attorney, and reiterated what he had said, but he confirmed the company wanted to move forward with its plan to hire 13 more employees through the Union for the construction project. (Jt. Exh. 17). On around September 21, Cagle sent Ahn referral forms for 13 Union members in response to his September 17 request. (Jt. Exh. 18). Those 13 members were Matthew H. Johnson, Adam R. Wilson, Tony L. Fraizer, Jr., Phillip White, Steven Yearwood, James C. Balchin, Jr., Chad W. Anderson, Frederick Joh, Joshua W. Ireland, Josh R. Cottrell, Jacob Segars, Frank N. Matheson III, and Trevor Nichols.

8. *Correspondence Terminating Agreement and Response*

At some point between September 18 and 23, Ahn spoke with the Genesys Sales Manager, Tim Fackler, about what Geren had said at the September 17 meeting about the exclusivity provision. Fackler later met with Ahn to review the language in the PLA and the CBA. After reviewing, Fackler told Ahn the CBA required that the company hire its employees through the Union's referral service. Fackler then advised Ahn that the company should withdraw from/terminate the agreement, and he helped Ahn draft a letter for that purpose. (Tr. 130-131).

On September 23, Ahn sent Cagle the letter, which stated "….it has never been TK LLC's intent to enter into any 'exclusive' agreement that would …. [r]equire [it] to utilize Local 72 or any other trade union or labor broker for provisions of 'all' labor per specific or identified assignment, location, or customer…. We therefore request immediate withdraw and termination without penalty of any and all obligations… of the … Project Labor Agreement … inclusive of all context and terms of the also noted CBA." (Jt. Exh. 19).

9. *Meeting with Stapleton* and *September 25 Termination of Employees and Refusal to Hire*

On September 23, Ahn and Kim arranged to meet with Randall Stapleton, Sr., the project foreman. They thanked him for his work but stated they had to terminate him and his crew because the company no longer had an agreement with the Union. Ahn stated the company terminated the agreement because the Union was requiring that it hire exclusively through the Union's referral service. Ahn told Stapleton, Sr. that they wanted him to continue working on the project, but they knew he could not because he was a Union member. (Tr. 55, 133). Stapleton, Sr. asked if he and his crew could work the rest of the week, and Kim agreed. They worked until September 25. (Tr. 55).

On September 25, Ahn emailed Cagle and others at the Union to inform them the company was terminating Stapleton, Sr., Stapleton, Jr., Jackson, Alley, and Printz. (Jt. Exh. 23). Each of the Separation Forms stated the reason was the "termination of agreement with [Union]." (Jt. Exh. 20).[13] Respondent also did not hire or employ any of the 13 Union members sent in response to its September 17 request.

10. *Post-Termination Events*

On September 30, Respondent entered into an agreement with Genesys to complete the work on the construction project. (R. Exh. 3).[14] On October 7, Cagle emailed Ahn stating the September 23 "request

[13] The forms also rated the employee's individual performance. One employee was rated "good" in three categories and "excellent" in seven, while the other four were rated "excellent" in eight categories and "good" in two.

[14] The agreement provided that if Genesys completed the work before that date, it would receive a bonus of $50,000 per day. But if the work was not completed by that date, Genesys would have to pay a penalty of $50,000 per day.

to withdraw" from the PLA was denied, and the terms of the agreement shall remain in full force and effect. Cagle also warned that should it be determined that the company has violated any terms of the PLA, the Union will take all available legal action to enforce the agreement. A week later, Cagle hand-delivered a copy of the letter to Ahn. (Tr. 75-76) (Jt. Exhs. 20 and 22). Respondent thereafter continued to perform covered work on the construction project without abiding by the terms of the agreement and without recognizing and bargaining with the Union.

DISCUSSION

A. Allegations

The General Counsel alleges that when Respondent executed the PLA on June 11 it adopted and became bound to the CBA and, thereby, agreed to recognize and bargain with the Union as the exclusive bargaining-representative of all journeymen, apprentices, tradesmen and helpers engaged in the installation of all plumbing and/or pipe fitting systems and component parts thereof employed by Respondent at the SKI Battery Plant project in Commerce, Georgia and/or the Pipe Fabrication Shop located in Jefferson, Georgia (collectively "unit employees"). The General Counsel further alleges that Respondent violated Section 8(a)(5) and (1) of the Act on September 23 when it terminated the agreement prior to its expiration, and, thereafter, when it repudiated/refused to honor the terms of that agreement, withdrew recognition and failed to bargain in good faith with the Union as the unit employees' exclusive bargaining representative, and, on September 25, when it discharged the five Union employees and rescinded its offer and refused to hire the 13 others referred by the Union pursuant to the terms of the parties' agreement and Respondent's September requests. The General Counsel also alleges that Respondent separately violated Section 8(a)(3) and (1) of the Act when it discharged/refused to employ these 18 individuals based solely on their Union membership. Respondent denies it was bound to the CBA, and, therefore, had no obligation to abide by the agreement, recognize and bargain with the Union, and/or hire or employ the employees at issue. As explained below, I conclude that Respondent violated the Act as alleged.

B. Termination/Repudiation of Agreement and Withdrawal of Recognition

This case involves an integrated agreement governed by Section 8(f) of the Act.[15] Under Section 8(f), employers and unions in the construction industry are permitted to enter into collective-bargaining agreements before the unions have established their majority status. See *John Deklewa & Sons*, 282 NLRB 1375, 1385-1387 (1987) enfd. sub nom. *Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988), cert. denied 488 U.S. 889 (1988).[16] Employers may not repudiate the terms of a Section 8(f) agreement or

[15] Par. 6 of the General Counsel's complaint alleges that Respondent recognized the Union as the exclusive collective-bargaining representative of the unit employees without regard to whether the Union's majority status had been established under Sec. 9(a) of the Act. It further alleges that all material times since June 11, the Union has been the Sec. 9(a) bargaining representative of the unit employees. At the hearing, I questioned the Union and Counsel for General Counsel whether the agreement/relationship being alleged in this case was governed under Sec. 8(f) or 9(a) of the Act, and both represented it was governed under Sec. 8(f), not Sec. 9(a). (Tr. 85-90).

[16] Construction industry employers can bind themselves to Sec. 8(f) agreements by various means. For example, employers may enter into 8(f) agreements directly, through membership in multi-employer associations which bargain on their behalf. Employers that are not members of a multi-employer association may also execute memoranda of understanding ("me-too" agreements) which bind them to agreements negotiated by the union and the association. These "me-too" agreements may bind an employer not only to an existing agreement, but to successor master contracts negotiated between the employer association and union. To determine an employer's obligation under a "me-too" agreement, the Board will look to the actual terms of the separate agreement(s) referenced in the "me-too" document it signs. If those separate agreements have automatic renewal provisions, those renewal provisions will be given effect and bind the non-signatory "me-too" employer to the continuation of the agreements. *Taylor Ridge Paving & Construction, Co*., 365 NLRB No. 168, slip op. at 3 (2017) (internal citations omitted).

withdraw recognition of the union as employees' exclusive bargaining representative prior to expiration of the agreement, unless those employees vote against union representation in a Board-conducted election. Id.

1. Respondent's Execution of the PLA Bound it to the CBA

When determining whether a collective-bargaining agreement has been formed or adopted, the Board does not strictly apply common-law contract principles. See generally *Transportation Union v. Union Pacific Railroad Co*., 385 U.S. 157, 160-161 (1966); *John Wiley & Sons v. Livingston,* 376 U.S. 543, 550 (1964); *J.I. Case Co. v. NLRB*, 321 U.S. 332, 334 (1944). See also *Intermountain Rural Electric Ass'n*, 309 NLRB 1189, 1192 (1992); *New Orleans Stevedoring Co*., 308 NLRB 1076, 1081 (1992), and *Crown Cork & Seal Co*., 268 NLRB 1089, 1093 (1984). The critical inquiry is whether the parties reached a "meeting of the minds" on all substantive issues and material terms. *Delta Sandblasting Co., Inc*., 367 NLRB No. 17, slip op. at 1 (2018); *Sunrise Nursing Home*, 325 NLRB 380, 389 (1998). This inquiry focuses not on the parties' subjective inclinations, but by their intent as objectively manifested in what they said to each other. *MK-Ferguson Co*., 296 NLRB 776, 776 fn. 2 (1989).

By its terms, the CBA applied to all employers that separately executed a "letter of assent" or other document agreeing to be bound to the CBA. Thus, the threshold issue is whether Respondent agreed to be bound to the CBA when it executed the PLA on June 11. The PLA plainly states "[t]he agreement is *a* Collective Bargaining Agreement/Project Labor Agreement" between Respondent and the Union for the duration of its work on the construction project and at the fabrication shop. This (capitalized) reference to the CBA and the PLA as a single, combined agreement objectively reflects the parties' intent to incorporate the CBA into the PLA.[17] From this language I conclude that Respondent agreed to be bound to the terms of the CBA and to recognize and bargain with the Union as the unit employees' exclusive bargaining representative for the duration of its work on the construction project and at the fabrication shop. See *Laborers Local 190 (VP Builders, Inc.),* 355 NLRB 532, 534-535 (2010).[18]

This conclusion is further bolstered by the circumstances surrounding the parties' execution of the PLA. When Ahn first contacted Cagle about supplying employees for the construction project, Cagle told him Respondent would need to sign an agreement with the Union covering the project. Cagle then described, in general, the terms contained in the CBA, including the hiring/referral process. Following that meeting, Cagle emailed Ahn a copy of the CBA with the subject line "CBA for PLA." He then emailed Ahn a copy of the PLA for signature. Ahn read both documents before forwarding them to Kim and asking him to sign and return the PLA. Ahn informed Kim that although he did not fully understand the 62-page CBA, he believed it was what the Union was "required to give to" Respondent, equating it to a covenants, conditions, and restrictions report that sellers are required to provide to buyers to advise them of additional terms governing the use of the conveyed real estate property.

[17] Given the PLA's language, I reject Respondent's arguments that it is a "word salad" that contains no substantive terms, imposes no obligations and bestows no benefits on either party, and does not incorporate by reference any other document(s). While the PLA, standing alone, lacks certain terms typically found in a self-contained collective-bargaining agreement, it includes one key term: the duration of the parties' agreement.

[18] Respondent argues that even if the language in the PLA was sufficient to bind Respondent to the CBA, it terminated that agreement the following day when Ahn emailed Cagle that the company no longer needed employees and that Cagle should void out the agreement and the parties would re-write a new one when Respondent was ready to hire. As stated, an 8(f) agreement may not be unilaterally terminated prior to its expiration, and, as stated below, Respondent's conduct subsequent to that email is consistent with a continuing intent to be bound to the agreement.

2. Parties' Conduct is Sufficient to Bind Respondent to the CBA

Assuming arguendo the language of the PLA is not sufficient to bind Respondent to the CBA, the Board has held that adoption of a collective-bargaining agreement is not dependent on the parties reducing their intent to be bound to writing; instead, it will be established by substantial conduct manifesting an intent to be bound. See e.g., *Asbestos Workers Local 84 (DST Insulation, Inc.)*, 351 NLRB 19, 19-20 (2007) This "adoption by conduct" doctrine applies equally to Section 8(f) agreements. See *E.S.P. Concrete Pumping, Inc*., 327 NLRB 711, 712 (1999). The Board reasoned that "[n]othing in the legislative history of Section 8(f) indicates that Congress intended employers to obtain free the benefits of stable labor costs, labor peace, and the use of the union hiring hall. Having had the music, he must pay the piper." *DST Insulation*, supra at slip op. at 9 (quoting *Jeff McNeff, Inc. v. Todd*, 461 U.S. 260, 271 (1983)).

No one factor is determinative in deciding whether there has been substantial conduct sufficient to bind the employer to an agreement. Some factors the Board considers are whether the employer pays wages and makes fringe benefit contributions in accordance with the collective-bargaining agreement, honors an agreement's union-security clause, deducts and remits union dues, uses the union hiring hall to secure employees, corresponds with the union in a manner consistent with the status of a union contractor, holds itself out as a union contractor to obtain benefits, appoints union stewards, and submits reporting forms stating it is in compliance with the terms of the collective-bargaining agreement. See *DST Insulation, Inc*., supra (employer manifested intent to be bound by paying new contractual wages rates, making fringe benefit contributions, acquiescing to a stipulated judgement in federal court and paying the amounts owed under the agreement, honoring the union-security clause and deducting and remitting union dues, and using the union's exclusive hiring hall to secure employees); *Cab Associates*, 340 NLRB 1391 (2003) (employer manifested intent to be bound by paying contractual wages including premium pay for union stewards, deducting and remitting union dues, submitting the necessary forms and contributions to the pension and welfare funds, and otherwise holding itself out as a union employer on jobsites); *E.S.P. Concrete Pumping, Inc*., supra (employer found to be bound to agreement by applying its terms for a year, holding itself out as a union contractor, and acquiescing in a judgment against it for unpaid contributions to the union's pension fund); *Haberman Construction Co*., 236 NLRB 79, 85-86 (1978), enfd. 641 F.2d 351 (5th Cir. 1981) (employer found to be bound by consistently contributing to the union benefit funds for four years, using the union's referral service and exclusively employing union members, paying union scale, observing contractual holidays, and appointing union job steward); and *Vin James Plastering Co*., 226 NLRB 125 (1976) (employer found to be bound by paying contractual wages and benefits over a 16-month period, checking off and remitting union dues, paying union benefit funds, and submitting forms stating it was complying with the terms of the agreement).

From mid-June (following Ahn's June 12 "void out the agreement" email) through mid-September, Respondent hired all its employees for the construction project through the Union's referral service and paid wages and fringe benefits in accordance with the CBA and the Addendum. It also completed and submitted reporting forms when it made benefit fund contribution payments. Further, Respondent began deducting and remitting Union dues and assessments once it was notified and asked to do so. Finally, in early August, when the issue arose over whether Stapleton, Jr. should have been paid overtime for work done on a Saturday, Ahn acknowledged the CBA applied when he quoted language from Article Six in his email to Cagle. Ahn asked Cagle for clarification as to the correct interpretation of that language to ensure that payroll had no further issues applying that provision, particularly since Respondent planned to hire more helpers through the Union for the project. As such, I conclude that Respondent engaged in substantial conduct manifesting its intent to be bound to the CBA.

In its defense, Respondent cites to *Cimato Brothers, Inc*., 352 NLRB 797, 800 (2008) and *Harry Asato Painting, Inc*., 362 NLRB 871, 879 (2015) for support as to why it did not adopt the CBA by its conduct. Neither has any precedential value. *Cimato Brothers* is a two-member Board decision that was

not subsequently adopted by the Board or the Court of Appeals after *New Process Steel, LP v. NLRB*, 560 U.S. 674 (2010). In *Harry Asato* the Board adopted the administrative law judge's findings on the relevant issues in the absence of exceptions. See *Whirlpool Corp*., 337 NLRB 726, 727 fn. 4 (2002), enfd. mem. 174 LRRM 2480 (6th Cir. 2004). Regardless, the cases are distinguishable. In *Cimato*, the Board found no adoption by conduct because the employer did not apply the agreements to its non-union employees, dealt directly with both union and non-union employees regarding wages and benefits, consistently maintained it was not bound by any agreements with the union, and never held itself out as a union-signatory contractor to obtain work. Respondent argues the first and last of these factors are also true here. That argument ignores the fact that Respondent sought out the Union's assistance in providing qualified employees and, in the process, signed an agreement adopting the CBA as a condition precedent to having access to those employees. In *Harry Asato*, the judge found adoption by conduct because the employer obtained benefits from being a union contractor, such as paying less than the prevailing wage, receiving a 5-percent bid discount by certifying its apprentices were enrolled in the union's apprenticeship program and obtaining lien-release letters from the union to secure payment from contractors. Respondent argues those factors do not exist here. Again, that argument ignores or trivializes the benefit Respondent received, which was the Union's dedicated assistance in providing qualified employees at a time when Respondent needed them for the construction project. Additionally, at the September 17 meeting, when Respondent sought assistance regarding a separate project in Las Vegas, the Union provided information to assist Respondent in getting qualified employees for that project.

Respondent argues that it withheld and paid Union dues "for only a handful of employees over a handful of weeks" and that such conduct was a technical violation of the Labor-Management Relations Act because the Union did not provide the necessary authorizations to make those deductions. The record reflects that from at least the point in August when the Union requested that Respondent deduct and remit Union dues and assessments, Respondent did so, and continued to do so, until it terminated the parties' agreement. And while Section 302(c)(4) of the Labor-Management Relations Act permits payroll dues deductions from bargaining unit employees' wages only when the employee has provided the employer a written assignment to do so, the Union's failure to provide those written assignments is not a defense to Respondent's termination or repudiation of the parties' agreement, particularly when there is no evidence Respondent would have maintained the agreement had it received those written assignments. See generally, *Gadsden Tool, Inc*., 340 NLRB 29 (2003), enfd 116 Fed.Appx 245 (11th Cir. 2004); *Williams Pipeline Co*., 315 NLRB 630 (1994). Furthermore, when Ahn and Kim testified as to why they terminated the agreement, the Union's failure to provide the written assignments was never mentioned as a reason.

Respondent next argues that if there was an agreement (to use the referral service), it was not an exclusive agreement. Having found the parties signed the PLA incorporating the CBA, Respondent was bound by the exclusivity provision therein.[19] Respondent's conduct further establishes its intent to be bound. Respondent indicated, both before and after execution of the PLA, that it intended to rely upon the Union to supply additional employees to work on the construction project and it acted accordingly. For the next three months, every employee it hired for that project came through the Union's referral service. As stated, the Board has held an employer cannot reap the benefits of accessing the union's referral service to

[19] During their June 8 meeting, Cagle generally explained to Ahn the terms in the CBA, including the hiring/referral process. In his June 10 text message, Ahn asked Cagle to confirm that if the company decided to hire the individuals the Union sent, those individuals would still need to fill out an employment application and their employment would be at-will and could be terminated for any reason. Cagle stated the Union was an at-will labor organization. Respondent argues this exchange, along with the fact that it already employed 30 hourly (non-Union) employees on the construction project prior to signing the PLA, manifests its intent not to have an exclusive referral arrangement. I reject that argument. Cagle's response was consistent with Article Four of the CBA, which states covered employers must go through the Union's referral service to obtain employees to perform covered work, but they retain the right to not hire or to later fire those referred by the Union, so long as that right is exercised on a non-discriminatory basis.

obtain qualified employees without paying the cost, which, in this case, is agreeing to be bound to the terms of the CBA, including the exclusivity provision.

3. Respondent's Remaining Defenses

Respondent also appears to argue that it would not have executed the PLA had it known it would be bound to the exclusivity provision, suggesting that it was somehow misled. In *Horizon Group of New England*, 347 NLRB 795, 797 (2006), the Board recognized the "fraud in execution" defense, stating:

> "'Fraud in the execution' arises when a party executes an agreement 'with neither knowledge nor reasonable opportunity to obtain knowledge of its character or its essential terms.'" *Southwest Administrators, Inc. v. Rozay's Transfer,* 791 F.2d 769, 774 (9th Cir. 1986). "To maintain a defense of fraud in the execution, [an employer] would have to establish 'excusable ignorance of the contents of the writing signed.'" Id. See also, *Iron Workers' Local 25 Pension Fund v. Allied Fence and Security Systems*, 922 F.Supp. 1250, 1259 (E.D. Mich. 1996) ("excusable ignorance" standard not satisfied solely by virtue of union misrepresentation where employer had subsequent opportunity to review the agreement before signing it); *Positive Electrical Enterprises*, 345 NLRB 915, 921 (2005) (no fraud in the execution found where employer had the opportunity to read the one-page letters of assent; judge discredited assertion that employer had no understanding of what he was signing); *Laborers' Pension Fund v. A & C Environmental, Inc*., 301 F.3d 768. 780-781 (7th Cir. 2002) ("fraud in the execution" defense not established where employer's claimed "ignorance of the nature of the contract was not excusable.").

These factors are not met in this case. Respondent has not shown that, at the time it signed the PLA, it did not know the character or essential terms of the incorporated CBA, including the exclusivity provision. Even if Respondent did not fully understand the implications of signing the PLA as it relates to the CBA and the exclusivity provision, the defense would still fail because Respondent has not shown that it did not have a reasonable opportunity to obtain knowledge of the document's character or its essential terms. As discussed, the PLA incorporates the CBA, and the Union provided a complete copy of the CBA before Respondent signed the PLA, which Ahn admittedly read and understood to apply to the parties' arrangement prior to telling Kim to sign and return it.

Respondent next points to Ahn and Kim's lack of knowledge and experience with unions and labor agreements, their cultural differences being from Korea, and limited understanding of the English language. Inexperience or ignorance of the law are not recognized defenses. See *Clinton Packing Co., Inc*., 191 NLRB 879, 884 (1971). Nor is failing to read and fully understand a contract before signing it. See generally *Jon P. Westrum d/b/a J. Westrum Electric*, 365 NLRB No. 151, slip op. at 12 (2017), enfd. 753 Fed.Appx. 421 (mem. unpub.) (8th Cir. 2019), cert. denied __ U.S. __, 140 S.Ct. 2771 (2020); *Morton Electric*, 314 NLRB 466, 468 (1994). Although Ahn may have had limited experience in labor relations, he is a real estate agent, familiar with the importance of negotiating, drafting, and carefully reviewing contract language. Rather than obtaining counsel to understand what exactly they were agreeing to, Ahn and Kim rushed to sign the PLA to get the Union's help in supplying needed employees for the project.

Overall, I conclude Respondent adopted and agreed to be bound by the CBA, without modification, and, thereby, agreed to recognize and bargain with the Union as the unit employees' exclusive bargaining representative for the duration of its work on the construction project and at the fabrication shop.[20] As a

[20] As stated, Art. One, Sec. 2 of the CBA states those employers to whom the Union has not yet demonstrated its majority status agree to recognize the Union as a bargaining representative for those employees who were referred or should have been referred by the Union. The five employees terminated and the 13 others who were not employed

result, I conclude that Respondent violated Section 8(a)(5) and (1) of the Act on September 23 when it prematurely terminated the 8(f) agreement prior to its expiration and, thereafter, when it repudiated/refused to honor the terms of that agreement and when it withdrew recognition from, and failed to bargain in good faith with, the Union as the unit employees' exclusive bargaining representative.[21]

C. Termination/Refusal to Hire Referred Employees

About two days after prematurely terminating/repudiating the agreement, Respondent discharged Randall Stapleton, Sr., Randall Stapleton, Jr., Mathew Jackson, Jesse Alley, and Dustin Printz and rescinded its offer and refused to hire Matthew H. Johnson, Adam R. Wilson, Tony L. Fraizer, Jr., Phillip White, Steven Yearwood, James C. Balchin, Jr., Chad W. Anderson, Frederick Joh, Joshua W. Ireland, Josh R. Cottrell, Jacob Segars, Frank N. Matheson III, and Trevor Nichols. The General alleges these adverse actions violated Section 8(a)(5) and (3), and, derivatively, Section (8)(a)(1) of the Act.[22]

These 18 individuals were all referred by the Union to work for Respondent pursuant to the terms of the CBA and Respondent's September requests. As discussed, Article 4 of the CBA gives Respondent the right to hire and to discharge referred employees provided that "such rights shall be exercised on a non-discriminatory basis and shall not be based on, or be in any way affected by, … union membership, bylaws, rules, regulations, constitutional provisions or any other aspect or obligation of union membership, policies or requirements." Respondent discharged/refused to employ these individuals solely because of their Union membership. By taking these actions, Respondent unilaterally repudiated/failed to honor the non-discrimination provision, without bargaining with the Union, in violation of Section 8(a)(5) and (1).[23]

The parties' briefs focus exclusively on the 8(a)(3) allegation. Section 8(a)(3) makes it unlawful for an employer to discriminate in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. When assessing the lawfulness of an adverse action that turns on employer motivation, the Board applies the analytical framework set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved by *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 395 (1983). Under that framework, the General Counsel must initially show that: (1) the employee engaged in Section

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were all referred by the Union to work for Respondent on the construction project in accordance with the CBA and in response to Respondent's early and mid-September requests for referrals.

[21] The Union, in its post-hearing brief, claims Respondent failed to provide it with requested information in violation of Section 8(a)(5) of the Act. There is no allegation in the complaint or raised at the hearing about a failure to provide requested information. The General Counsel is the "master of the complaint and controls the theory of the case." *Fineberg Packing Co*., 349 NLRB 294, 296 (2007). "A charging party may not expand the scope of the complaint without the consent of the General Counsel." *Planned Building Services*, 330 NLRB 791, 793 fn. 13 (2000). I, therefore, need not address this claim.

[22] In its answers, Respondent raises various affirmative defenses. It appears to have abandoned those defenses by not presenting evidence or argument in support. One of those defenses is deferral of the underlying charge. Even if this was not abandoned, the Board will not defer when, as here, the party has wholly repudiated the agreement that allows for arbitration in the first place. *Littlejohn Electric Solutions, LLC,* 368 NLRB No. 76, slip op. at 1 fn. 1 (2019).

[23] Although the General Counsel does not advance the legal theory upon which I am finding a violation, I find it is appropriate to exercise my discretion in this manner. See *DirectSat USA, LLC*, 366 NLRB No. 40, slip op. at 8 fn. 22 (2018)(cases cited therein) (Board upheld a violation on a different theory than that pursued by the General Counsel where the violation was alleged in the complaint, the factual basis for the violation was clear from the record, the law was well established, and no due process concerns were implicated). The 8(a)(5) complaint allegation regarding the discharges/refusal to employ these individuals is sufficiently broad to encompass this legal theory. It alleges that Respondent took these adverse actions after terminating and later repudiating the terms of the agreement, without bargaining with the Union. Respondent argued that it had no obligation to abide by the terms of the agreement or to bargain with the Union because there was no agreement. As a result, there also are no due process implications because the parties fully litigated the repudiation issues.

7 activity, (2) the employer knew of that activity, and (3) the employer had animus against the Section 7 activity. If the General Counsel establishes these factors, the burden shifts and the employer must show it would have taken the same action in the absence of the protected activity. However, in *NLRB. v. Great Dane Trailers, Inc*., 388 U.S. 26 (1967), the Supreme Court held that if it reasonably can be concluded that the employer's discriminatory conduct was "inherently destructive" of important employee rights, no proof of animus is needed, and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations. Alternatively, if the adverse effect of the discriminatory conduct on employee rights is "comparatively slight" animus must be proven to sustain the charge if the employer has come forward with evidence of legitimate and substantial business justifications for the conduct.

Respondent discharged/refused to employ these 18 individuals following its premature termination/repudiation of the parties' agreement because of their Union affiliation. In *Jack Welsh Co., Inc*., 284 NLRB 378 (1987), the Board adopted the judge's finding that the employer violated 8(a)(3) when it discharged employees solely because of their union membership. The employer was bound to an expiring 8(f) agreement and wanted to become an "open shop." Once the agreement expired, the employer's owner notified the union that he would not be signing a new agreement. He also advised the job foreman that he was "getting out of the Union." He instructed the foreman to give the men their final paychecks and to tell them that "he was not going to have a union anymore--that he dropped union membership." Thereafter, the company hired about seven new employees, none of whom were union members. The judge rejected the employer's defense that he assumed the union employees would not work for him under "open shop" conditions; thus, he "in effect accepted their resignations before they were offered." The judge held it was incumbent upon the employer to make known its decision to change their employment conditions and give them an opportunity to decide whether to continue working before unilaterally making the decision for them. The Board adopted the judge's findings that under the circumstances, without any additional evidence of animus beyond these statements, the terminations were effectuated to discourage membership in the Union, in violation of Section 8(a)(3).

On this allegation, Respondent cites to *Hawaiian Dredging Construction Co., Inc*., 368 NLRB 7 (2019) for support. In that case, the Board ultimately held the employer did not violate Section 8(a)(3) when it discharged all its union welders upon expiration of the parties' 8(f) agreement. For at least 20 years, the employer performed all its work requiring craft labor under 8(f) agreements. After the parties were unable to agree on the terms for a successor agreement, the employer terminated its 8(f) agreement. Thereafter, the employer ceased performing all welding work and discharged its 13 union-represented welders, citing to the expiration of the contract as the reason. About a week later, the employer signed a new 8(f) agreement with another union which covered welding work. The employer notified the 13 discharged welders they could return to work with the company, but they would need to go through the new union's referral process. A complaint was filed alleging the discharges violated 8(a)(3).

The Board majority (McFerran dissenting) dismissed the complaint, holding the post-contract discharges were consistent with the employer's longstanding practice of only performing craft work under a collective-bargaining agreement, which it no longer had at the time of the discharges. The majority concluded the employer showed it had a legitimate and substantial business justification under *Great Dane*, the General Counsel failed to demonstrate union animus, and, alternatively, the employer proved under *Wright Line* that it would have discharged the employees anyway based on its longstanding practice.

I find *Hawaiian Dredging Construction* to be inapposite. Respondent terminated/repudiated the parties' 8(f) agreement *prior to its expiration* and did so in direct response to the Union's threat to enforce the exclusivity provision, which would interfere with Respondent's plans to subcontract the remainder of the covered work to Genesys. Ahn and Kim told Stapleton, Sr. during their September 23 meeting that the Union's threat led Respondent to terminate/repudiate the agreement and, as a result, discharge Stapleton,

Sr. and his crew. An employer that terminates employees as part of a plan to escape the obligations under a collective-bargaining agreement engages in conduct "inherently destructive of important employee rights." *Swift Independent Corp*., 289 NLRB 423, 429, fn. 14 (1988), affd. in rel. part sub nom. *Esmark, Inc. v. NLRB*, 887 F.2d 739 (7th Cir. 1989)(employer's opening of non-union plant and repudiation of collective bargaining agreement was inherently destructive and communicated that collective bargaining was a "futile exercise"); *D & S Leasing*, 299 NLRB 658, 660-661 (1990), enfd. sub nom *NLRB v. Centra*, 954 F.2d 366 (6th Cir. 1992)(termination of labor agreement so employer could pay lower wages was inherently destructive; analogous to unlawful sham closing of facility in order to reopen under more favorable terms).

Under the circumstances, these adverse actions which were a direct result of Respondent's premature termination/repudiation of the parties' agreement are both inherently destructive and strong evidence of union animus. Furthermore, Respondent has failed to present a legitimate and substantial business justification for taking these actions and failed to prove that it would have taken the same actions in the absence of the Union threatening to enforce the exclusivity provision. As a result, these discharges/refusals to employ also violated Section 8(a)(3) and (1) of the Act.

CONCLUSIONS OF LAW

1. Respondent, TK, LLC, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Charging Party, the Pipefitters Local 72, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO ("Union"), is a labor organization within the meaning of Section 2(5) of the Act.

3. On June 11, 2020, Respondent entered into a project labor agreement with the Union binding it to the Union's agreement with the Mechanical Contractors Association of Georgia, Inc. ("Association") whereby it agreed to recognize and bargain with the Union as the exclusive collective-bargaining representative of all its journeymen, apprentices, tradesmen and helpers engaged in the installation of all plumbing and/or pipe fitting systems and component parts thereof employed by Respondent at the SKI Battery Plant project in Commerce, Georgia ("construction project") and/or the Pipe Fabrication Shop located in Jefferson, Georgia ("fabrication shop") (collectively "unit employees") for the duration of its work at those locations.

4. Respondent violated Section 8(a)(5) and (1) of the National Labor Relations Act ("Act") when it notified the Union on September 23, 2020 that it was terminating their agreement prior to its expiration, and, later, when it repudiated/refused to honor the terms of the agreement, withdrew recognition from the Union and thereby failed and refused to bargain in good faith with the Union as the unit employees' exclusive collective-bargaining representative, and on September 25, 2020 when it discharged the five Union employees and rescinded its offer and refused to hire the 13 others referred by the Union pursuant to the terms of the agreement and Respondent's September requests.

5. Respondent violated Section 8(a)(3) and (1) of the Act on September 25 when it discharged Randall Stapleton, Sr., Randall Stapleton, Jr., Mathew Jackson, Jesse Alley, and Dustin Printz and rescinded its offer and refused to hire Matthew H. Johnson, Adam R. Wilson, Tony L. Fraizer, Jr., Phillip White, Steven Yearwood, James C. Balchin, Jr., Chad W. Anderson, Frederick Joh, Joshua W. Ireland, Josh R. Cottrell, Jacob Segars, Frank N. Matheson III, and Trevor Nichols because they joined or assisted the Union and engaged in concerted activities, and to discourage employees from engaging in those activities.

6. Respondents' unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

On the findings of fact and conclusions of law herein, and on the entire record in this case, I issue the following recommended[24]

REMEDY

As a remedy for these unfair labor practices, Respondent is ordered to cease and desist from its unlawful conduct and to take certain affirmative action. Respondent will be required to reinstate Randall Stapleton, Sr., Randall Stapleton, Jr., Mathew Jackson, Jesse Alley, and Dustin Printz to their former positions or, if that position no longer exists, to a substantially equivalent position, without prejudice to their seniority or any other rights or privileges previously enjoyed. Respondent also will be required to employ Matthew H. Johnson, Adam R. Wilson, Tony L. Fraizer, Jr., Phillip White, Steven Yearwood, James C. Balchin, Jr., Chad W. Anderson, Frederick Joh, Joshua W. Ireland, Josh R. Cottrell, Jacob Segars, Frank N. Matheson III, and Trevor Nichols in the positions for which they were referred on about September 21, 2020, or, if that position no longer exists, to a substantially equivalent position, without prejudice to their seniority or any other rights or privileges previously enjoyed. Respondent shall make each individual whole for any loss of earnings and other benefits suffered as a result of its unlawful termination/refusal to employ on about September 25, 2020.[25] The make-whole whole remedy for each individual shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In accordance with *King Soopers, Inc*., 364 NLRB No. 93 (2016), enfd. in relevant part 859 F.3d 23 (D.C. Cir. 2017), Respondent also will be ordered to compensate these individuals for their search-for-work and interim employment expenses regardless of whether those expenses exceed their interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra. In accordance with *Don Chavas, LLLC d/b/a* T*Tortillas Don Chavas*, 361 NLRB 101 (2014), Respondent also shall be ordered to compensate each of the individuals for the adverse tax consequences, if any, of receiving a lump sum backpay award. In accordance with *AdvoServ of New Jersey, Inc*., 363 NLRB 1324 (2016), Respondent will also be ordered to file with the Regional Director for Region 10, within 21 days of the date the amount of backpay is fixed either by agreement or Board order, a report allocating backpay to the appropriate calendar year for each. The Regional Director will then assume responsibility for transmission of the report to the Social Security Administration at the appropriate time and in the appropriate manner. In accordance with *Cascades Containerboard Packing-Niagara*, 370 NLRB No. 76 (2021), as modified 371 NLRB No. 25 (2021), Respondent also will be ordered to file with the Regional Director, within 21 days of the date the amount of backpay is fixed either by agreement or Board order, copies of each individual's corresponding W-2 forms reflecting the backpay awards.

As for the remaining violations, Respondent is ordered to recognize and bargain with the Union as the exclusive collective-bargaining representative of the unit employees and to honor and comply with the terms and conditions of the 2018-2021 area collective-bargaining agreement between the Union and the Association, and any automatic renewal or extension of it, for the duration of its work on the construction project and fabrication shop. To the extent not already addressed in the prior paragraphs, Respondent shall

[24] If no exceptions are filed as provided by Sec. 102.48 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes

[25] To the extent that the General Counsel requests consequential damages, I deny the request but note that the issue is currently under review by the Board. See *Thryv, Inc*., 371 NLRB No. 37 (2021).

make the unit employees whole for any loss of earnings and other benefits they may have suffered as a result of the Respondent's unlawful conduct in the manner set forth in forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In addition, Respondent will make all contractually required fringe benefit fund contributions, if any, that were not made since its unlawful termination/repudiation, including any additional amounts due the funds in accordance with *Merryweather Optical Co*., 240 NLRB 1213, 1216 fn. 7 (1979). Further, the Respondent shall reimburse the unit employees for any expenses ensuing from its failure to make the required contributions, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981). Respondent also will compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 10, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee, in accordance with *AdvoServ of New Jersey, Inc*., 363 NLRB No. 143 (2016). In accordance with the Board decision in *Cascades Containerboard Packaging--Niagara*, 370 NLRB No. 76 (2021), as modified in 371 NLRB No. 25 (2021), the Respondent shall also be required to file with the Regional Director for Region 10 a copy of each backpay recipient's corresponding W-2 form(s) reflecting the backpay award.

ORDER

Respondent, TK, LLC, its officers, agents, successors, and assigns shall

1. Cease and desist from

(a) Withdrawing recognition from and failing to bargain with the Union as the exclusive collective-bargaining representative of the unit employees for the duration of its Section 8(f) project labor agreement (incorporating the area collective-bargaining agreement between the Union and the Association) with the Union.

(b) Terminating, repudiating, or otherwise failing to abide by the above agreement.

(c) Terminating, refusing to hire, or otherwise discriminating against employees because of their membership in, activities on behalf of, or referral from the Union, or any other labor or organization.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Honor and comply with the terms and conditions of the project labor agreement (incorporating the area collective-bargaining agreement) for the duration of its work at the construction project and the fabrication shop.

(b) Make whole all bargaining unit employees for any loss of earnings and other benefits suffered as a result of its repudiation/failure to honor the above agreement.

(c) Make all contractually required contributions to the Union’s fringe benefit funds that Respondent has failed to make since about September 25, 2020, and reimburse employees, with

interest, for any expenses resulting from our repudiation/failure to make the required payments under the above agreement.

(d) Make whole Randall Stapleton, Sr., Randall Stapleton II, Mathew Jackson, Jesse Alley, and Dustin Printz for their unlawful discharge; make each whole for reasonable search-for-work and interim employment expenses, plus interest; compensate each for the adverse tax consequences, if any, of receiving a lump-sum backpay award; file with the Regional Director for Region 10, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year(s); file with the Regional Director for Region 10 a copy of corresponding W-2 forms for each reflecting the backpay award; remove from our files any reference to these unlawful discharges, and within 3 days thereafter, notify each in writing that this has been done and that their discharge will not be used against them in any way.

(e) Make whole Matthew Johnson, Adam Ryan Wilson, Tony Lamar Frazier, Jr., Phillip K. White, Steven H. Yearwood, James C. Balchin, Jr., Chad W. Anderson, Frederick Joh, Joshua William Ireland, Josh Rodney Cottrell, Jacob D. Segars, Frank Noel Matheson, III and Trevor Nichols for the unlawful refusal to employ; make each whole for reasonable search-for-work and interim employment expenses, plus interest; compensate each for the adverse tax consequences, if any, of receiving a lump-sum backpay award; file with the Regional Director for Region 10, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year(s); file with the Regional Director for Region 10 a copy of corresponding W-2 forms for each reflecting the backpay award; remove from our files any reference to these unlawful discharges, and within 3 days thereafter, notify each in writing that this has been done and that their discharge will not be used against them in any way.

(f) Compensate all unit employees for any adverse income tax consequences of receiving a lump- sum backpay award, and file with the Regional Director for Region 10, within 21 days, a report allocating the backpay award to the appropriate calendar years for each employee.

(g) Recognize and, upon request, bargain in good faith with the Union as the exclusive collective-bargaining representative of the unit employees for the duration of its work at the construction project and the fabrication shop.

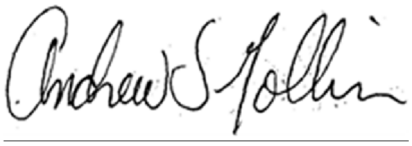
(h) Within 14 days after service by the Region, post at the construction project and the fabrication shop the attached notice marked "Appendix."[26] If the locations involved in these proceedings are open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the locations involved in these proceedings are closed due to the COVID–19 pandemic, the notices must be posted within 14 days after the location reopens and a substantial complement of employees have returned to work, and the notices may not be posted until a substantial complement of employees have returned to work. Any delay in the physical posting of paper notices also applies to the electronic distribution of the notice if customarily communicates with its employees by electronic means. Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by Respondent's authorized representative, shall be posted by Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees/members are customarily posted. In addition to

[26] If this Order is enforced by a judgment of a United States court of appeals, the words in each of the notices referenced herein reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if Respondent customarily communicates with its employees/members by such means. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current and former members of the Union and current and former employees employed by Respondent at any time since September 23, 2020.

(i) Within 21 days after service by the Region, file with the Regional Director for Region 10 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

Dated, Washington, D.C., May 12, 2022



Andrew S. Gollin
Administrative Law Judge

APPENDIX

(To be printed and posted on official Board notice form)

THE NATIONAL LABOR RELATIONS ACT GIVES YOU THE RIGHT TO:

- Form, join, or assist a union;
- Choose a representative to bargain with us on your behalf;
- Act together with other employees for your benefit and protection;
- Choose not to engage in any of these protected activities.

WE WILL NOT interfere with, restrain, or coerce you in the exercise of the above rights.

WE WILL NOT fail or refuse to recognize and bargain with the Plumbers and Pipefitters Local 72, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO ("Union") as exclusive bargaining representative of the following unit employees:

> All journeymen, apprentices, tradesmen and helpers engaged in the installation of all plumbing and/or pipe fitting systems and component parts thereof employed by TK, LLC at the SKI Battery Plant project in Commerce, Georgia and/or the Pipe Fabrication Shop located in Jefferson, Georgia.

WE WILL NOT repudiate or refuse to abide by the terms of the collective-bargaining agreement Mechanical Contractors Association of Georgia, Inc. and the Union which we adopted for the duration of our work at the SKI Battery Plant project in Commerce, Georgia and the Pipe Fabrication Shop located in Jefferson, Georgia.

WE WILL NOT fire you because of your union membership or support.

WE WILL NOT refuse to hire you because of your union membership or support.

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the National Labor Relations Act.

WE WILL recognize and, upon request, bargain in good faith with the Union as the exclusive collective-bargaining representative of our unit employees over wages, hours, and other terms and conditions of employment.

WE WILL honor and comply with the terms and conditions of the collective-bargaining agreement between the Mechanical Contractors Association of Georgia, Inc. and the Union which we adopted for the duration of our work at the SKI Battery Plant project in Commerce, Georgia and the Pipe Fabrication Shop located in Jefferson, Georgia.

WE WILL make whole all bargaining unit employees for any loss of earnings and other benefits suffered as a result of our failure to honor the collective-bargaining agreement.

WE WILL make all contractually required contributions to the Union's fringe benefit funds that we have failed to make since about September 25, 2020, and reimburse our employees, with interest, for any expenses resulting from our failure to make the required payments under the collective-bargaining agreement.

WE WILL offer Randall Stapleton, Sr., Randall Stapleton II, Mathew Jackson, Jesse Alley, and Dustin Printz full reinstatement to their former jobs or, if that job no longer exists, to a substantially equivalent position, without prejudice to their seniority or any other rights or privileges previously enjoyed; **WE WILL** make each whole for any loss of earnings and other benefits suffered as a result of our repudiation/failure to honor the above collective-bargaining agreement; **WE WILL** make each whole for reasonable search-for-work and interim employment expenses, plus interest. Compensate each for the adverse tax consequences, if any, of receiving a lump-sum backpay award; **WE WILL** file with the Regional Director for Region 10, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year(s); **WE WILL** file with the Regional Director for Region 10 a copy of corresponding W-2 forms for each reflecting the backpay award; and **WE WILL** remove from our files any reference to these unlawful discharges, and **WE WILL**, within 3 days thereafter, notify each in writing that this has been done and that their discharge will not be used against them in any way.

WE WILL offer to employ Matthew Johnson, Adam Ryan Wilson, Tony Lamar Frazier, Jr., Phillip K. White, Steven H. Yearwood, James C. Balchin, Jr., Chad W. Anderson, Frederick Joh, Joshua William Ireland, Josh Rodney Cottrell, Jacob D. Segars, Frank Noel Matheson, III and Trevor Nichols to the positions for which they were referred on about September 21 or, if that job no longer exists, to a substantially equivalent position, without prejudice to their seniority or any other rights or privileges previously enjoyed; **WE WILL** make each whole for any loss of earnings and other benefits suffered as a result of our repudiation/failure to honor the above collective-bargaining agreement; **WE WILL** make each whole for reasonable search-for-work and interim employment expenses, plus interest. Compensate each for the adverse tax consequences, if any, of receiving a lump-sum backpay award; **WE WILL** file with the Regional Director for Region 10, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year(s); **WE WILL** file with the Regional Director for Region 10 a copy of corresponding W-2 forms for each reflecting the backpay award; and **WE WILL** remove from our files any reference to these unlawful refusal to hire, and **WE WILL**, within 3 days thereafter, notify each in writing that this has been done and that their discharge will not be used against them in any way.

WE WILL compensate all unit employees for any adverse income tax consequences of receiving a lump-sum backpay award, and **WE WILL** file with the Regional Director for Region 10, within 21 days, a report allocating the backpay award to the appropriate calendar years for each employee.

TK, LLC

(Employer)

Dated: **By:**

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. We conduct secret-ballot elections to determine whether employees want union representation and we investigate and remedy unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below or you may call the Board's toll-free number 1-844-762-NLRB (1-844-762-6572). Hearing impaired callers who wish to speak to an Agency representative should contact the Federal Relay Service (link is external) by visiting its website at https://www.federalrelay.us/tty (link is external), calling one of its toll free numbers and asking its Communications Assistant to call our toll free number at 1-844-762-NLRB.

401 W. Peachtree Street, NE
Suite 2201
Atlanta, GA 30308

Telephone: (404)331-2896
Hours of Operation: 8 a.m. to 4:30 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/10-CA-267762 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Centralized Compliance Unit at complianceunit@nlrb.gov